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Supreme Court of the United States

OCTOBER TERM, 1949

No. ——

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

versus

L. C. HASELDEN, RESPONDENT

OFFICIAL REPORT OF OPINIONS DELIVERED IN THE COURTS BELOW

The decision of the Supreme Court of the State of South Carolina will be found on page 126 of the record, and in 53 S. E. (2d), page 60 (S. E. Reporter, Advance Sheet No. 1).

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The basis upon which it is contended that this Court has jurisdiction to review the judgment of the Supreme Court of South Carolina in this case contained on Page 6 of petitioner's brief, *i. e.*, that the case was tried under an Act of Congress of the United States commonly referred

to as the Federal Employers' Liability Act (USC Title 45, Section 51-59) is correct.

STATEMENT OF CASE

Respondent, a forty-year old family man, was a section foreman for petitioner, having charge of the maintenance and repair of a section of tracks in and near Society Hill, South Carolina, which are used by petitioner in intrastate and interstate commerce. Prior to July 10, 1946, respondent received orders to load ten rails which were located across a ditch from the railroad tracks of petitioner near Society Hill, S. C., which were to be used by petitioner in repairing its lines used in interstate commerce (R. 68, 69). Upon receiving the orders, respondent was told that a gondola car would be furnished for this work instead of a flat car which is normally used (R. 72). Respondent informed his superiors immediately that he could not load the rails on a gondola car from across this ditch, and requested that they send additional men to aid in loading if a gondola car was to be used (R. 29, 36). Petitioner refused to send additional men and sent the gondola car with instructions regarding the manner in which the rails were to be loaded, including instructions to use short rails across the ditch to the top of the gondola (R. 29). On July 10, 1946, respondent began loading the rails in accordance with his orders and instructions. Two rails used as skids were placed on the side of the gondola, one on each end, and the other end of the skids across the ditch. Three men, including respondent, were in the car and three on the ground. A rope was placed around one end of a rail, and while the men on the ground were pushing, the men in the car would pull the rail to within about six inches of the top of the gondola and tie it to prevent it sliding back down. Then they went to the other end and pulled it up. While the rail was being held in place,

respondent moved to lay his rope across the car and when returning, the loose end sprung in the car striking respondent crushing his leg and foot. This was the sixth rail loaded (R. 27-30, 31, 36-37, 50, 51).

The allegations of negligence in the complaint are correctly set forth in petitioner's brief at Page 2 (R. 6, 7).

Petitioner admitted certain formal allegations of the complaint and in substance entered a general denial and pleaded contributory negligence and assumption of risk by way of affirmative defense. Respondent has taken the position that assumption of risk is not a defense, and a plea of contributory negligence does not properly plead sole negligence.

Petitioner has not set forth in its summary statement of the matters involved all of the testimony relating to the manner in which the injury was received, and for convenience the testimony quoted in petitioner's brief (Page 3) and the additional testimony relating to the injury is quoted (R. 27-30):

"Mr. Mozingo: We don't care to offer the whole book unless counsel care to offer it, we would like just to have rule 1057 and rule 1060 as having a bearing on this. Will you read to the jury what rule 1057 is or do you want me to?

A. You read it.

Mr. Mozingo: 'They will report to and receive their instructions from the road master. They must have a copy of the current time table'.

Q. Now, who was your roadmaster?

A. Mr. J. G. Dial.

Q. He is considered your superior or your boss?

A. Yes.

Q. That is what they mean in this rule, Mr. Dial was the man to whom you reported and from whom you got your instructions?

A. Yes.

Q. Now rule 1060 says: 'They are required to direct the labor of their hands and are expected to engage personally in all work necessary to keep their section in proper order'.

Q. Now on July 10th were you working for the railroad, 1946?

A. Yes.

Q. What were you doing that day?

A. Loading rails.

Q. Now, before those rails were loaded, who had given you instructions to load these rails?

A. Mr. Dial.

Q. That is the road master?

A. Yes.

Q. When had Mr. Dial given you these instructions?

A. On the afternoon before.

Q. What did he tell you about loading the rails, and what did you tell him?

A. He told me that he wanted me to load ten rails, and load them the next morning first thing and ship them to McFarlane.

Q. Where is McFarlane?

A. It is about twenty miles up to North Carolina.

Q. In North Carolina?

A. Yes.

Q. Now, how did you go about loading these rails?

A. He told me to load the rails and ship them up there and I asked him if he would get a flat car and he told me to load them and I could get a flat car and order a flat car and if I could not get that to get a gondola. I went to order the car and they could not get a flat car and they sent a gondola, and I told them if they sent a gondola I would not be able to load it from where the rails are at.

Q. How long are the rails?

A. Thirty-three feet.

Q. And how heavy?

A. Eighty-five pounds to the yard.

Q. You told him you did not have enough men to load and what happened?

A. Then he told me to put up some skids and load them from the side and take some short rails and load from the side and get some rope and load from the side, and I asked him if he would send me some rope, and he said he would not have time and I could borrow some or get some around there, and I went and bought the rope.

Q. Now, Mr. Haselden, is this what you call a gondola?

A. Yes.

Q. Would you just show the jury here exactly how you proceeded to load those rails?

A. The rails were over here, we put the rail up and put a rope around there and pulled it up within six or eight inches of the top.

Q. Where were you?

A. Inside the car.

Q. Where were the other men?

A. Three men on the ground and myself and two men in the car. We pulled the rail on this end to about six or eight inches and then tied the rope over here and go back and pull this end of the rail up until we got it within our reach. The men on the ground pushed and stayed there until the men could come around the car and get in, by taking the rope off while they were coming around and walking over and laid it on the end of the car and I turned around came back and the men pulled the rail just as I was walking up the car and the rail turned and come on me and hit my leg, and I slipped down and my leg jerked me back into it.

Q. Now, you say that the men here were pushing until it got out of reach?

A. Yes.

Q. If you had had a flat car as you ordered, would it have been necessary for them to push it that high up?

A. They could have pushed it up without getting it out of reach.

Q. The rail would not have ever been out of reach to the men on the ground?

A. No.

Q. If you had had a flat car as you ordered and did not receive, what would have been the way that it would have been loaded?

A. You could load on the skid but you would have had power to push it up with. Pulling with a small rope, we did not have power to load."

* * *

(R. 31)

"Mr. MOZINGO: Mr. Haselden, you were in the car then at the time the rail came down on you?

A. Yes.

Q. What happened after that?

A. Well, I was jerked down and it caught my foot and I tried to staighten up and fell over backwards. I had to ask one of the men to untie my shoe.

Q. Now, these were being loaded, I believe you said, from across a ditch?

A. Yes.

Q. And all of this was pursuant to, and the way you loaded this car, was pursuant to instructions received by you from the road master, Mr. Dial?

A. Yes."

* * *

(R. 36-37)

"Q. Now, Mr. Haselden, when you were talking to the road master there about loading these rails, state whether or not you asked for additional help?

A. I did; I asked him to let Mr. Jones come up and help me load.

Q. Who is Mr. Jones?

A. He is the section foreman up above me at Cheraw.

Q. Does Mr. Jones have a crew of men?

A. Yes, the same as I do.

Q. And this help was not given you?

A. No, he said I could load my rails and put up the skid and go ahead and load it."

* * *

(R. 50)

"Q. Now, Mr. Haselden, about the rope that they asked you about in the statement, state whether or not you asked Mr. Dial, your superior, for some rope to load this?

A. I did, I asked him if he was going to send me the rope to load with.

Q. Did he send you any rope?

A. No sir; he did not.

Q. He did not provide you with any grease to grease the rails with?

A. No.

Q. Now, they asked you about hiring the men, you hired these fellows that were helping load but who were they paid by?

A. The Atlantic Coast Line Railroad.

Q. You, of course, were responsible to Mr. Dial, yourself?

A. Yes."

* * *

(R. 51)

"Q. * * * Did the rail come up on the gondola and spring over there in the car on you or not or was it shoved over last?

A. It was pulled up, whenever they went to pull the rail up, the rail hit the side of the gondola and turned over to me just as I walked up there to help the men with the rail."

The manner in which the injury occurred was repeated on cross examination (R. 44-48).

The quoted portion of the charge (petitioner's brief, Page 4) is only part of the instructions given relating to this matter. The additional portion is added below:

"Now, I charge you, gentlemen, that there is a positive duty on the part of the master to furnish the servant with reasonably safe instrumentalities wherewith and places wherein to work. The master is required to furnish his servant with such proper tools and appliances as may be required for the reasonable safe prosecution of the work. To make the master liable for failure to furnish tools and appliances it must be shown that the tools and appliances were necessary, and that they were not at hand at the time. It is the duty of the master to furnish a sufficient number of men to do the work in which the servant is engaged with reasonable safety, or with reasonable safety to all here engaged in the accomplishment or the performance of that particular work. It is the duty of the master to furnish a safe number of persons to perform the services required, or do the particular work or piece of work assigned. The test or degree of care that the master must exercise is due care, that is, it is the duty of the master to exercise due care to protect the servant from injury."

The remaining portions of petitioner's statement of the case are substantially correct.

SUMMARY OF ARGUMENT

Respondent will attempt to show that this Court should deny the writ of *certiorari* to the Supreme Court of South Carolina for the reasons:

A. That under the decisions of the United States Supreme Court relating to the liability of the master for injuries to an employee in cases brought under the Federal Employers' Liability Act, respondent was entitled to have the issues of negligence of petitioner submitted to the jury.

B. There was no error in the trial court in submitting the specifications of negligence contained in the complaint to the jury, there being evidence to support the various

specifications; that the several elements from which negligence could be inferred were so closely interwoven as to require the submission of all the specifications of negligence for the consideration of the jury.

C. That there was no error in the charge of the trial judge as the language used has been approved by the Supreme Court of the State of South Carolina and the United States Supreme Court in actions of this type.

D. This court has expressed itself as being unwilling to review cases already canvassed by two or three courts, especially where the controlling legal principles have been recognized by the court below, review being granted only on the basis of importance to the operation of our federal system, the importance of the outcome to the parties not being enough.

ARGUMENT

Point I

Was there sufficient evidence of actionable negligence to justify the submission of the case to the jury?

As has been stated, this action is under the Federal Employers' Liability Act, and resulted in a judgment for respondent in the amount of Forty-five Thousand ($45,000.00) Dollars for serious and permanent injury. Petitioner in the first paragraph of its argument on Page 15 quotes only a portion of Paragraph 5 of the complaint, and the entire complaint (R. 4-7) should be considered as well as the specifications of negligence (R. 7).

The testimony of respondent relating to the manner in which the injury occurred has heretofore been quoted under the Statement of the case, and will not be again repeated.

For convenience the following portion of the Federal Employers' Liability Act (45 USCA, Section 51) is quoted:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

In arriving at the intention of Congress in passing the Act, the Court is urged to consider the fact that the common law defense in actions by a servant against the master of assumption of risk does not apply, and the defense of contributory negligence applies only in so far as it is to be considered by the jury in mitigation of damages.

The decisions of the Supreme Court of the United States are all in accord, and it is only necessary to here apply the rules laid down to the facts as herein set forth. A review of a few of the most recent cases should be pertinent.

The case of *Blair v. Baltimore & O. R. Co.*, 89 L. Ed. 490, 323 U. S. 600, is so similar from a factual standpoint to the case here under consideration that except for the name of the parties and the fact that steel tubes instead of steel rails were being moved, it could be considered the same case. In the *Blair case*, the Supreme Court of the State of Pennsylvania reversed a judgment of the Court of Common Pleas, and upon writ of certiorari the United States Supreme Court reversed the State Court. We quote at length from the opinion:

> (P. 493) "To deprive railroad 'workers of the benefit of a jury trial in close or doubtful cases is to

take away a goodly portion of the relief which Congress has afforded them'.

* * *

(P. 493) "* * * Petitioner's duties were to load and unload inbound and outbound freight. In unloading a car standing at the platform adjacent to respondent's warehouse, petitioner came to three 10-inch seamless steel tubes, approximately 30 feet long and weighing slightly more than a thousand pounds each. The pipes were greased and slick. The petitioner went to his superior, informed him that the pipes were too heavy for him to move and suggested that it was not customary for the railroad to unload pipes of this kind at its warehouse, but to send the car directly to the consignee's place of business where it had proper equipment for unloading heavy material. This suggestion was rejected and petitioner was then told to get Mr. Miller, the car inspector, and Mr. Fanno, the section man, to help him unload.

"Petitioner's insistence that the three could not unload the heavy pipes was overridden, and he was then told to go ahead and do the work or they 'would get somebody else that would'. Under these circumstances, petitioner undertook to unload the pipes and carry them through the warehouse to place in the consignee's truck which had backed up to the warehouse platform on the opposite side from the railroad car. The best equipment available for moving the pipes was a 'nose truck' of the kind commonly used in railroad stations to move freight and luggage. It was about five feet long and two feet high, consisting of a flat metal frame, with an upright flange and two wheels at one end and wheelbarrow handles at the other. The problem was to balance three greased, 1,000-pound, 30-foot steel tubes on this truck, move them across two platforms through the warehouse and place them in the consignee's truck. The men took the nose truck into the car, managed to get the first pipe lengthwise on it, worked it through the car door to the platform over a

steel bridge connecting the car and the platform, and then carried it to the waiting truck. Petitioner held one handle of the nose truck with one hand and the steel tube with the other. Miller occupied the same position as to the other handle and the pipe. Fanno held the pipe and the truck at its wheel end. They were all necessarily crouching, since the truck was only two feet high when moved in a level position, as it had to be, to keep the tube from slipping off. **The first tube was successfully moved.** While they were attempting to move the second tube **in the same manner,** it slipped. Fanno and Miller released their holds, but petitioner did not. The heavy tube in slipping caused the truck to kick back resulting in petitioner's injury." (Emphasis ours.)

* * *

(P. 494) "* * * The negligence of the employer may be determined by viewing its conduct as a whole. *Union P. R. Co. v. Hadley,* 246 U. S. 330, 332, 333, 62 L. Ed. 751, 754, 755, 38 S. Ct. 318. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the other."

* * *

(P. 494) "The court below, however, thought that the plaintiff should not recover because he had assumed the risk of this danger. It is to be noted that at the time this case was tried Congress had passed an Act which completely abolished the defense of assumption of risk."

There, as here, petitioner went to his superior and informed him that the pipes to be loaded were too heavy and that it was not customary to unload the pipes in this manner, that the equipment provided was not proper for unloading heavy material, that the number of men given him was not sufficient, the place for work was unsafe for this

work in this manner, but notwithstanding this, he was directed to go ahead and "do the work".

Petitioner herein urges that the method, the number of men, equipment, and etc., were sufficient as proven by the fact that several rails were loaded without mishap. In the *Blair case* as in the case here, the first tube was successfully moved in the same manner as the injured employee was attempting to move the second tube.

Had petitioner furnished respondent with a flat car upon which to load the 935-pound rails, which is normally furnished, the five men with respondent would have been sufficient, as they would not have had to push the rails so high and could all have applied their strength at the same time. As it was, part of the men had to get inside the car and part stayed on the ground until the rail was pushed beyond their reach, thereby dividing their force. As each rail was loaded, the strength of the men necessarily decreased so that the force used to load the rail which injured respondent was greatly decreased. It also must be kept in mind that respondent was not furnished with proper ropes, etc., was directed to use short rails which he had to place across a ditch making it further difficult for the men to push the rails up, all of which contributed to respondent's injury.

Language appropriate to these conditions and circumstances is contained in the opinion in the case of *Ellis v. Union Pacific Railroad Company*, 91 L. Ed., 572, 329 U. S., 649 (decided February 3, 1947). That action was brought under the Federal Employers' Liability Act, and resulted in a verdict for the plaintiff in the amount of Ten Thousand ($10,000.00) Dollars. The Supreme Court of the State of Nebraska reversed the lower court, and upon writ of certiorari being granted, the United States Supreme Court

reversed the Supreme Court of Nebraska. The following is quoted from the decision:

> (P. 576) "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. *Tennant v. Peoria & P. U. R. Co.* 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409, 15 N. C. C. A. (N. S.) 647; *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740, *supra*. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. *Lavender v. Kurn, supra* (327 U. S. p. 652, 90 L. Ed. 922, 66 S. Ct. 740). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury."

Here, as there, there is a reasonable basis for concluding that defendant's negligence caused the injury.

The following is quoted from *Bailey v. Central Vermont R. Co.*, 87 L. Ed., 1444, 319 U. S., 350:

> (P. 1446): "* * * The hopper car could have been opened before it was moved onto the bridge and any cinders which spilled on the roadbed shoveled onto the roadway beneath the bridge. Or after the cinders had been dumped upon the roadbed a railroad tie could have been utilized as a drag to push cinders from the roadbed to the ground below the bridge.
>
> "Bailey died from the injuries resulting from the fall."

* * *

(P. 1447) "Section 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees'. The rights which the Act creates are federal rights protected by federal rather than local rule of law. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A. (N. S.) 44, 1 N. C. C. A. 875; *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 S. Ct. 635, L. R. A. 1915 C 1, 8 N. C. C. A. 834, Ann. Cas. 1915 B 475; *Chesapeake & O. R. Co. v. Kuhn*, 284 U. S. 44, 76 L. Ed. 157, 52 S. Ct. 45. And those federal rules have been largely fashioned from the common law (*Seaboard Air Line R. Co. v. Horton, supra* except as Congress has written into the Act different standards. *Tiller v. Atlantic Coast Line R. Co.* 318 U. S. 54, ante, 610, 63 S. Ct. 444, 143 A. L. R., 967. At common law the duty of the employer to use reasonable care in furnishing his employees with a **safe place to work** was plain. 3 Labatt, Master & Servant, 2d ed. § 917. That rule is deeply ingrained in federal jurisprudence. *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 664, 45 L. Ed. 361, 364, 21 S. Ct. 275, and cases cited: *Kreigh v. Westinghouse, C. K. & Co.*, 214 U. S. 249, 256, 257, 53 L. Ed. 984, 988, 29 S. Ct. 619; *Kenmont Coal Co. v. Patton* (CCA 6th) 268 F. 334, 336. As stated by this Court in the *Patton case* it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery'." * * * (Emphasis ours.)

* * *

(P. 1447) "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the

car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller v. Atlantic Coast Line R. Co.* 318 U. S. 54, ante, 610, 63 S. Ct. 444, 143 A. L. R. 967, (*supra*) as well as issues involving controverted evidence. *Jones v. East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445, 32 L. Ed. 478, 480, 9 S. Ct. 118; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 572, 34 L. Ed. 235, 241, 10 S. Ct. 1044. To withdraw such a question from the jury is to usurp its functions.

"The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence'. *Jacob v. New York*, 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 854. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

At the risk of repetition, we compare the case under consideration with the *Bailey case*, and state that the nature of the task which Haselden undertook (loading ten heavy

rails), the hazards which it entailed (injury by heavy rails falling or slipping), the effort which it required (pushing 935-pound rails up short skids with three men pushing until the rails were out of reach and three pulling), the kind of footing the workers had (walking down into and up and across a ditch while raising the rails), the space where he could stand (in the gondola running from one end to the other, trying to do the work of two men, three of the other men in a ditch), the absence of a guard or means to prevent rail from falling or slipping (insufficient tools, nothing to prevent rail from falling into the gondola), the height of the gondola above the ground (the side of the gondola was approximately three feet higher than a flat car and the workers had to stand in and near a ditch), and the fact that a flat car and additional men, better equipment and better plans could have been furnished "are all circumstances for the jury to weigh and appraise in determining whether" petitioner in furnishing Haselden "with that particular place in which to perform the task was negligent".

The case of *Urie v. Thompson, Trustee, etc.*, 93 L. Ed., 927 (Advance Sheet No. 16, Opinion filed May 31, 1949) ..... U. S., ..., indicates the extent of the coverage afforded by the Federal Employers' Liability Act. There, it was held that plaintiff's petition stated a cause of action under the Federal Employers' Liability Act when plaintiff contracted silicosis, reversing the State Supreme Court and reinstating a verdict in the amount of Thirty Thousand ($30,000.00) Dollars. The opinion stated that the humanitarian purposes sought to be achieved by this legislation, its accepted standard of liberal construction in order to accomplish those objects, and the absence of anything in the legislative history indicating a congressional intent to require a restricted interpretation must be con-

sidered; that on its face every injury suffered by an employee while employed by reason of the carrier's negligence was made compensable.

In a concurring opinion Mr. Justice Frankfurter had this to say:

> (P. 948) * * * "So long as the gamble of an occasional heavy verdict is not replaced by the security of a modern system of insurance, courts must continue to apply the notion of negligence in situations for which it was never intended. Therefore, if a claim is made that an injury is casually related to a carrier's failure to maintain standards of care appropriate for employment on a railroad, the Federal Employers' Liability Act entitles an employee to establish that claim to a jury's satisfaction * * *.

Petitioner would have this court interpret the opinion of the Supreme Court of South Carolina as indicating that it holds that this act makes the railroad an absolute insurer. This interpretation is incorrect. It is alleged and there was testimony to support the allegations of the complaint to the effect that defendant was negligent in the particulars therein stated, and under the testimony petitioner was entitled to have the issues of negligence submitted to the jury.

Clyde Wilkerson v. Wilson McCarthy, 93 L. Ed. 408 (Advance Sheet No. 7. Opinion dated January 31, 1949). ..... U. S. .....

Howard F. Coray, etc. v. Southern Pacific Company, 93 L. Ed. Page 243 (Advance Sheet No. 5, Opinion dated January 3, 1949). ..... U. S. .....

If there is evidence of forseeable danger to the employee, it is a question for the jury. *Lillie v. Thompson*, 92 L. Ed. 73, 332 U. S. 459.

Had better tools been furnished, proper plans or advice as to performing the work been given, more men allowed respondent to assist in loading the rails, different appliances at the place in question, a flat car sent to respondent, this injury would never have occurred, and it is submitted that the testimony was ample to submit the issue of petitioner's negligence in these respects to the jury. The negligence of the employer should be determined by viewing his conduct as a whole, and especially is this true where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern and where each imparts character to the others. *Blair v. Baltimore & O. R. Co., supra.*

The fact that the rail which injured respondent was bent did not of itself cause the injury, but the various negligent acts and omissions of petitioner contributed to the accident which resulted in respondent's injury, and as has been pointed out above, the fact that five rails had already been loaded does not negative the inference of negligence, but on the contrary makes a conclusion of negligence inescapable, as the lack of a sufficient number of men increased the hazard as each rail was loaded, and as was stated in *Blair v. Baltimore & O. R. Co., supra,* the fact that the same act was previously successfully done in the same manner, does not preclude a recovery by respondent.

Point II

Did the State Supreme Court err in sustaining the submission for the consideration of the jury the specifications of negligence?

Petitioner cites one opinion of the United States Supreme Court in support of this point, *Wilmington Star Min. Co. v. Fulton,* 205 U. S. 60, 51 L. Ed. 708. This case was

decided in January, 1907, and is not authority for petitioner's position. This was an action for wrongful death of plaintiff's intestate, involved no federal act, and was in the Federal Court solely because it was removed there upon the grounds of diversity of citizenship of the parties. The case involves the law and legislative acts of the State of Illinois.

As already pointed out, all the acts of defendant were interwoven and each imparted character to the other, each was a link in an unbroken chain of reasonably forseeable events. *Lillie v. Thompson, supra.*

Petitioner reverts constantly to the argument that five rails had already been loaded, and would have the court hold that there was no evidence from which the jury could find negligence under specification "A". The court is referred to what has already been said under Point I with reference to the unsafe place to work in loading heavy rails across the ditch, and strain on these men in loading five rails before respondent's injury. *Blair v. Baltimore & O. R. Co., supra.*

Specification "B" is supported by the testimony that respondent was directed to take short rails, place them across the ditch, and had an insufficient amount of rope with which to work and given no instruments with which to work.

The failure to give respondent sufficient help and the failure to provide a safe place to work after notice to petitioner, the failure to provide respondent with proper and adequate tools, grease for the skids, and the result in allowing said rail to injure respondent has already been discussed under Point I, and this evidence warrants the submission of the question of negligence under Specifications "C", "D", "E", and "H" to the jury.

There was inference of negligence in the failure of petitioner to give respondent proper plans and methods and better supervision with which to work sufficient to support specifications of negligence "F" and "G". This has been discussed under Point I.

Negligence on the part of the employer in any of these respects is sufficient to warrant a recovery by the employee. This rule is deeply ingrained in federal jurisprudence. *Bailey v. Central Vermont R. Co., supra.*

Point III

Did the Supreme Court of South Carolina err in sustaining the trial Judge's charge to the jury as to the employer's duty in relation to furnishing a safe place to work and safe tools and appliances?

The pertinent portion of the judge's charge is set forth under statement of case, and will not be repeated here. It is axiomatic that the charge of a trial judge should be considered as a whole. He charged that it is a positive duty on the part of the master to furnish the servant with reasonably safe instrumentalities wherewith and wherein to work (R. 99). The trial judge went on, however, in the next sentence to charge that the master is required to furnish the servant with such proper tools and appliances as may be required for the reasonable safe prosecution of the work. Throughout the charge, it refers to the duty of the master as that which is reasonable under the circumstances, and finally he states that the test or degree of care that the master must exercise is due care, and in order that there be no misunderstanding, it was repeated to the jury that it is the duty of the master to exercise due care to protect the servant from injury.

Much stress is placed upon the use of the word "positive" in the judge's charge, and petitioner seeks to show that this word is synonomous with "absolute". Such a meaning cannot be attached to the word "positive" as used in this charge.

In the case of *Tucker v. Holly Hill Lumber Co.*, 200 S. C. 250, 20 S. E. (2d) 704, it was stated that it is the positive duty of the master to furnish the servant with reasonably safe instrumentalities wherewith and places wherein to do his work.

It was stated in *Nuckols v. Great Atlantic and Pacific Tea Co.*, 5 S. E. 2d 862 (864), 192 S. C. 156, that these duties on the part of the master are positive, absolute and personal.

The case of *E. M. Patton, etc. v. Texas and Pacific R. Co.*, 45 L. Ed. 361, 179 U. S. 658, states that this duty of the employer is a positive one. We quote from the language of the opinion:

> (P. 364) * * * "That while the employer is bound to provide a safe place and safe machinery in which and with which the employee is to work, and while this is a **positive** duty resting upon him, and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe" * * * (Emphasis ours.)

The use of the word "absolutely" in the same sentence shows the legal distinction in such cases between it and the word "positive".

Since the decision in this case the standard of care required has been enlarged and a stricter duty imposed upon the employer as indicated by the fact that assumption of risk and contributory negligence is not now a defense. The

rights which the act creates are federal acts protected by federal rather than local rules of law, and these federal rules have been largely fashioned from the common law, except where congress has written into the act different standards. The rule as laid down in the *Patton case* not only has not been modified by act of Congress or decision of this court, but the duty of the employer as stated in the *Patton case* was expressly affirmed and adopted as the law in the case of *Bailey v. Central Vermont Railway, supra,* decided May 24, 1943.

The following is quoted from Volume 33, Page 57 of "Words and Phrases":

> "In an action for injuries to a servant, a charge that the master owes the **positive** duty to an employee to provide him with a reasonably safe place to work, so far as the nature of the work undertaken and the exigencies of the case will permit the same to be made reasonably safe', is a correct statement of the law, and is not objectionable as requiring the master to insure the safety of the place; the word 'positive' being used rather as the antithesis of the word 'delegable' than as a measure of the diligence required of a master. *Harris v. Brown Bay Logging Co.*, 106 P. 152, 154, 57 Wash. 8." (Emphasis ours.)

In *Coray v. Southern Pacific Company, supra,* which was an action under the Federal Employers' Liability Act, the court held that the language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose.

Here we have the correctness of the use of this word "positive" in the judge's charge backed by authority of the Supreme Court of the State of South Carolina, the courts of other states, "Words and Phrases", which has been ac-

cepted as an authority in such matters, and lastly by the opinions of the United States Supreme Court, the court of last resort and the court which petitioner now asks to review this case on this ground.

At the conclusion of the charge, the trial judge inquired if there was anything further requested by petitioner. While it is the duty of the trial judge in the courts of South Carolina to properly instruct the jury on all issues involved without request, if a clearer or more complete charge is desired, it is incumbent upon the party desiring the same to request it.

CONCLUSION

Every consideration was given petitioner during the trial of this case. The trial judge had the further opportunity to consider his rulings and charge upon motion for a new trial, which is the practice in this state. The Supreme Court of the State of South Carolina has passed upon this case sustaining the same applying federal rules of law, indicating by its thorough and lengthy opinion and five months consideration before handing down a unanimous decision, that the greatest care was observed in passing upon all questions before the court. Under the law as announced by the Supreme Court of the State of South Carolina and the United States Supreme Court, the most recent decisions being cited herein and relied upon, it is earnestly submitted that there is no error.

In a concurring opinion in the case of *Clyde Wilkerson v. Wilson McCarthy, supra,* Mr. Justice Frankfurter had this to say:

> (P. 411) "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that

the proper disposition of such cases demands, I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts even though those facts may have been erroneously appraised. * * * Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough" * * *.

To the same effect is the concurring opinion of Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Chief Justice Stone in *Bailey v. Central Vermont R. Co., supra.*

(P. 1449) "And so the policy of the court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. And this has been especially so where a decision below **recognized the controlling legal principles** but was claimed to have applied them improperly to the specific facts disclosed." * * * (Emphasis ours.)

* * *

(P. 1449) "In almost every litigation the parties are afforded hearings in at least two courts. This was true here, the appellate court being the supreme court of the state of the parties' residence. If, in such a case, we accord a third hearing, whenever we should have applied the law differently, we shall have little time or opportunity to do aught else than examine the claims of plaintiffs and defendants that, in the special circumstances disclosed, prejudicial errors have been committed in the admission of evidence, in rulings of law, and in charges to juries".

For the foregoing reasons, it is respectfully submitted that the writ of certiorari to the Supreme Court of South Carolina should be denied.

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Of Counsel.

CERTIORARI DENIED